FILED
NOV - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-526

IN THE

Supreme Court of the United States

WACHOVIA BANK, N.A.,
Petitioner,

v.

EASTMAN KODAK COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

PHILIP D. ANKER
DAVID S. LESSER
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Ave.
New York, N.Y. 10022
(212) 230-8800

CRAIG GOLDBLATT
Counsel of Record
JOEL MILLAR
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20037
(202) 663-6000

QUESTIONS PRESENTED

1. Whether *res judicata* requires a creditor to assert state law claims for damages against another creditor in bankruptcy proceedings of a common debtor in which the full remedy sought by the plaintiff-creditor against the defendant-creditor is unavailable.

2. Whether *res judicata* requires a creditor to assert state law claims for damages against another creditor in bankruptcy proceedings of a common debtor when the claims at issue in the damages action and the bankruptcy do not arise out of a common nucleus of operative facts and, hence, are not based on the same cause of action.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 9

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Page(s)

Allen v. *McCurry*, 449 U.S. 90 (1980) 19

Aquatherm Industries, Inc. v. *Florida Power & Light Co.*, 84 F.3d 1388 (11th Cir. 1996) 10

Augustin v. *Mughal*, 521 F.2d 1215 (8th Cir. 1975) 15

Bank of LaFayette v. *Baudoin (In re Baudoin)*, 981 F.2d 736 (5th Cir. 1993) 12, 14

Celotex Corp. v. *Edwards*, 514 U.S. 300 (1995) 17

Cen-Pen Corp. v. *Hanson*, 58 F.3d 89 (4th Cir. 1995) 17

Commissioner of Internal Revenue v. *Sunnen*, 333 U.S. 591 (1948) 10, 19

CoreStates Bank, N.A. v. *Huls America, Inc.*, 176 F.3d 187 (3d Cir. 1999) 10, 11, 13, 14

Countrywide Home Loans v. *Davis (In re Davis)*, No. 05-6214, 2006 U.S. App. LEXIS 15840 (10th Cir. June 21, 2006) 11

Crop-Maker Soil Services, Inc. v. *Fairmount State Bank*, 881 F.2d 436 (7th Cir. 1989) 14

D-1 Enterprises v. *Commercial State Bank*, 864 F.2d 36 (5th Cir. 1989) 17

Dunn v. *Sears, Roebuck & Co.*, 645 F.2d 511 (5th Cir. Unit A May 1981) 15

Eastern Minerals & Chemicals Co. v. *Mahan*, 225 F.3d 330 (3d Cir. 2000) 13, 18

Elscint, Inc. v. *First Wisconsin Financial Corp. (In re Xonics, Inc.)*, 813 F.2d 127 (7th Cir. 1987) 18

Enewally v. *Washington Mutual Bank (In re Enewally)*, 368 F.3d 1165 (9th Cir.), *cert. denied*, 543 U.S. 1021 (2004) 17

Feld v. *Zale Corp. (In re Zale Corp.)*, 62 F.3d 746 (5th Cir. 1995) 17

Feminist Women's Health Center v. *Codispoti*, 63 F.3d 863 (9th Cir. 1995) 10

Froebel v. *Meyer*, 217 F.3d 928 (7th Cir. 2000) 10

TABLE OF AUTHORITIES—Continued

Page(s)

Gargallo v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 918 F.2d 658 (6th Cir. 1990) 10

Harris v. *Ashley*, No. 97-5961, 1998 U.S. App. LEXIS 22693 (6th Cir. Sept. 14, 1998) 11

Havercombe v. *Department of Education of Commonwealth of Puerto Rico*, 250 F.3d 1 (1st Cir. 2001) 11

In re Beard, 112 B.R. 951 (Bankr. N.D. Ind. 1990) 17

In re Energy Cooperative, Inc., 814 F.2d 1226 (7th Cir. 1987) 11

In re Enron Corp, No. 01-16034 (AJG) (Bankr. S.D.N.Y. July 15, 2004) 18, 19

Kaiser Aerospace & Electronics Corp. v. *Teledyne Industries, Inc. (In re Piper Aircraft Corp.)*, 244 F.3d 1289 (11th Cir.), *cert. denied*, 534 U.S. 827 (2001) 8, 9, 10, 11, 17

Klehr v. *A.O. Smith Corp.*, 521 U.S. 179 (1997) 19

Lane v. *Peterson*, 899 F.2d 737 (8th Cir. 1990) 11

Marrese v. *American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985) 10

Marshall v. *Marshall*, 126 S. Ct. 1735 (2006) 15

Mpoyo v. *Litton Electro-Optical Systems*, 430 F.3d 985 (9th Cir. 2005) 11

NBN Broadcasting, Inc. v. *Sheridan Broadcasting Networks, Inc.*, 105 F.3d 72 (2d Cir. 1997) 11

Nestor v. *Pratt & Whitney*, No. 05-1754-cv, 2006 U.S. App. LEXIS 24844 (2d Cir. Oct. 4, 2006) 10

Novacare Holdings, Inc. v. *Mariner Post-Acute Network, Inc. (In re Mariner Post-Acute Network, Inc.)*, 267 B.R. 46 (Bankr. D. Del. 2001) 17, 19

Peterson v. *Watt*, 666 F.2d 361 (9th Cir. 1982) 15

Pittsburg County Rural Water District No. 7 v. *City of McAlester*, 358 F.3d 694 (10th Cir. 2004) 10

Pittston Co. v. *United States*, 199 F.3d 694 (4th Cir. 1999) 11

TABLE OF AUTHORITIES—Continued

Page(s)

Prochotsky v. *Baker & McKenzie*, 966 F.2d 333 (7th Cir. 1992) 14
S.N.A. Nut Co. v. *Häagan-Dazs Co. (In re S.N.A. Nut Co.)*, 215 B.R. 1004 (Bankr. N.D. Ill. 1997) 19
Secon Service System, Inc. v. *St. Joseph Bank & Trust Co.*, 855 F.2d 406 (7th Cir. 1988) 14
Stanton v. *District of Columbia Court of Appeals*, 127 F.3d 72 (D.C. Cir. 1997) 11
Sure-Snap Corp. v. *State Street Bank & Trust Co.*, 948 F.2d 869 (2d Cir. 1991) 11, 12
Test Masters Educational Services v. *Singh*, 428 F.3d 559 (5th Cir. 2005) 11
Texas Employers' Insurance Ass'n v. *Jackson*, 862 F.2d 491 (5th Cir. 1988) 10
United States v. *Berman*, 884 F.2d 916 (6th Cir. 1989) 15
Wallis v. *Justice Oaks II, LTD (In re Justice Oaks II, LTD)*, 893 F.2d 1544 (11th Cir.), *cert. denied*, 498 U.S. 959 (1990) 10, 11
Wolf v. *Gruntal & Co.*, 45 F.3d 524 (1st Cir. 1995) 10

STATUTES AND RULES

11 U.S.C. § 510(c) 8
28 U.S.C. § 157 15
28 U.S.C. § 1334(b) 15
Fed. R. Bankr. P. 7001 17
Fed. R. Civ. P. 13(g) 15

OTHER AUTHORITIES

Restatement (Second) of Judgments (1982) 9, 10

This petition seeks review of the court of appeals' straightforward application of two uncontroversial principles of *res judicata* (or claim preclusion) law. In the underlying dispute, Respondent Eastman Kodak Company ("Kodak") has sued Petitioner Wachovia Bank, N.A. ("Wachovia"), in New York for state law claims of breach of contract, fraud, and tortious interference, seeking compensatory, consequential, and punitive damages (the "Damages Action"). Kodak alleges that Wachovia fraudulently induced Kodak into making a $30 million loan to Atlanta Retail, Inc., f/k/a Wolf Camera, Inc. ("Wolf"), a photographic retailer that subsequently filed for protection under chapter 11 of the U.S. Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, in bankruptcy court in Georgia. In response to Kodak's New York suit, Wachovia sought an injunction from the bankruptcy court barring the Damages Action, asserting that various orders entered by the bankruptcy court in Wolf's bankruptcy precluded Kodak from pursuing its Damages Action against Wachovia, on *res judicata* grounds. The bankruptcy court granted Wachovia's request, and the district court affirmed.

The court of appeals reversed, holding that Kodak's damages claims against Wachovia are not precluded under *res judicata* because (1) Kodak could not have obtained the full remedy it seeks against Wachovia in the Damages Action by contesting the liquidation and distribution of Wolf's assets in the bankruptcy proceedings, and (2) in any event, Kodak's damages claims against Wachovia were not based on the same cause of action as Wolf's bankruptcy. Addressing the particular circumstances of this case, the court of appeals correctly determined that Wachovia's entire share of Wolf's bankruptcy estate would have been insufficient to satisfy the claims that Kodak asserts against Wachovia in the Damages Action, and that, in any event, Kodak would have had to file a separate lawsuit to obtain the monetary relief it seeks in the Damages Action. In addition, the Eleventh Circuit determined that the Damages Action—in which Kodak seeks relief solely against Wachovia, not against Wolf—did not concern the same nucleus of operative facts as

the orders entered in Wolf's bankruptcy, in which the bankruptcy court approved new financing for Wolf, authorized the sale of substantially all of its assets and the distribution to its creditors of the proceeds, approved the settlement of litigation brought in bankruptcy court by Wolf's official creditors committee (not by Kodak), and confirmed Wolf's liquidating chapter 11 plan.

Wachovia's petition does not identify any circuit conflict or error regarding the court of appeals' articulation of these well-worn precepts of claim preclusion law or their fact-bound application here. The petition is without merit and should be denied.

STATEMENT OF THE CASE

1. *Kodak's New York Damages Action.* Kodak's Damages Action against Wachovia concerns Wachovia's alleged tortious and otherwise unlawful actions in connection with a $30 million loan Kodak made to Wolf in 2000. Kodak and a syndicate of bank lenders for which Wachovia acted as the administrative agent (the "Bank Lenders") had both provided secured financing to Wolf during the 1990s. *See* Pet. App. 2a. In September 1998, Kodak and the Bank Lenders entered into a "Subordination Agreement," under which Kodak agreed to subordinate its liens and right of repayment from Wolf to the Bank Lenders' liens and right of repayment. *Id.* At the same time, Kodak and Wachovia also entered into a separate "Intercreditor Agreement," which required each party to use its best efforts to notify the other promptly of events that might "significantly affect the other Secured Creditor with regard to the ability of [Wolf] to meet its obligations." *Id.* at 3a (internal quotation marks omitted).

In late 1999, Kodak began discussions with Wolf about providing an additional $30 million in financing. Pet. App. 3a. Kodak's purpose in extending this loan was to finance the expansion of Wolf's stores, thereby increasing the volume of Kodak products sold by Wolf, which was at the time one of Kodak's major retailers. *See id.* Kodak accordingly mandated, as an explicit "use-of-proceeds" covenant in the

loan documents, that Wolf could use the funds only to expand and refurbish its stores. *See id.* at 3a-4a. Wachovia encouraged Kodak to make this loan, but concealed from Kodak its motivation for doing so: Aware that Wolf's financial condition was deteriorating, Wachovia planned to seize the proceeds to pay down the Bank Lenders' own outstanding loans to Wolf rather than allow Wolf to use the funds to expand and refurbish its stores. *See id.* at 3a.

In early February 2000, Wolf notified Wachovia, but not Kodak, that it was or would soon be in breach of financial covenants in its loan agreement with the Bank Lenders. *See* Pet. App. 24a. Wachovia and the other Bank Lenders executed a consent waiving Wolf's covenant defaults, but conditioned the waiver on Wolf's obtaining the $30 million loan from Kodak and using the proceeds to pay down the Bank Lenders' loan. *Id.* at 3a. Wachovia never informed Kodak of Wolf's covenant defaults or the condition specified in the consent, despite its obligation to do so under the Intercreditor Agreement. *See id.* Rather, Wachovia misled Kodak into believing that Wachovia would approve of Wolf's use of the new $30 million Kodak loan to expand and refurbish Wolf's stores. In particular, Wachovia commented on Kodak's draft loan agreement without requesting any change to the use-of-proceeds terms. *See id.* at 3a-4a. Instead, all Wachovia asked of Kodak was that it reaffirm the Subordination and Intercreditor Agreements, which Kodak did. *See Id.* at 190a ¶ 63.

At the same time, Wachovia circulated to the other Bank Lenders both the draft Kodak loan agreement and a draft amendment to the Bank Lenders' loan agreement. The conflict between the two documents could not have been more stark. The Kodak loan agreement required Wolf to use the $30 million "to fund new photo retail store development, new photo retail store acquisitions and [to] upgrad[e] the capability of existing and acquired retail stores." Pet. App. 4a. In contrast, the amendment to the Lenders' loan agreement required Wolf to pay the entire $30 million to the Bank Lenders "immediately upon such receipt." *Id.* at 191a ¶ 69.

In its Damages Action, Kodak alleges that Wachovia deliberately hid this amendment to its loan agreement from Kodak, knowing full well that it conflicted with the conditions in Kodak's loan agreement with Wolf and that Kodak would never lend $30 million to Wolf simply to enable Wolf to pay down the Bank Lenders' loan. *Id.* at 193a ¶ 90.

Unaware that Wachovia was requiring Wolf to pay the Kodak loan proceeds to the Bank Lenders, Kodak entered into the $30 million loan agreement in March 2000. Pet. App. 3a. On March 28, 2000, Kodak disbursed the loan proceeds to Wolf. *Id.* at 4a. Wachovia seized the funds on the same day and applied them to pay down Wolf's debt to the Bank Lenders. *Id.* Wolf was able to use none of the funds to expand its business, as Kodak had required as a condition of its loan. *Id.*

In May 2002, Kodak uncovered evidence of Wachovia's deception and sued Wachovia in the bankruptcy court in New York. *See* Pet. App. 46a. Thereafter, it voluntarily dismissed that action without prejudice and sued Wachovia in New York state court. *See id.* at 7a. In this Damages Action, Kodak alleges state law fraud, breach of contract (the Intercreditor Agreement), and tortious interference (with Kodak's loan agreement with Wolf). It seeks compensatory, consequential, and punitive damages from Wachovia. *Id.* at 6a-7a. Wachovia subsequently removed the case to the United States District Court for the Western District of New York, where it is currently pending.

2. *Wolf's Georgia Bankruptcy Proceeding.* On June 21, 2001, Wolf filed a petition for relief under chapter 11 of the U.S. Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Georgia. Pet. App. 4a. From the outset, the bankruptcy case was on a fast track. Within a month after the filing, the bankruptcy court had entered one of the five orders (the "Orders") that it would later determine should bar Kodak's subsequent Damages Action—an order approving emergency, post-petition "debtor-in-possession" financing (the "DIP Financing") provided by some of the Bank Lenders to give Wolf the funds

necessary to continue in operation long enough to sell its assets (the "DIP Financing Order"). *See id.* The DIP Financing Order did not purport to address any of the facts surrounding Wachovia's alleged deception of Kodak, which Kodak would later uncover, or to resolve any of the state law claims that Kodak would later assert in its Damages Action. It merely recounted Wolf's stipulation that the Bank Lenders had valid first-priority, pre-petition liens on Wolf's assets (a fact that Kodak has never disputed). Kodak did not object to its entry. *See id.*

A little more than a month later, on August 23, 2001, Wolf filed a motion in its bankruptcy case to sell substantially all of its assets to Ritz Camera Centers. Pet. App. 5a. This motion led to two additional Orders that the bankruptcy court subsequently determined also should bar Kodak's Damages Action. The first, entered on September 21, 2001, simply authorized the sale (the "Sale Order"). *Id.* Kodak did object to this motion, but on a narrow ground having nothing to do with the facts surrounding Wachovia's deceit, which only later would come to light. *Id.* at 6a. Kodak argued that, as a matter of bankruptcy law, the bankruptcy court could not approve the sale without Kodak's consent because it held a junior lien on the assets to be sold and the sale price was insufficient to pay Kodak in full (indeed, at all). *Id.* at 5a. The bankruptcy court overruled that objection, holding that Kodak's lien had no legal significance because the assets were not sufficient even to satisfy in full the senior liens of the Bank Lenders and that, in any event, Kodak had waived any right to object to such a sale in the Intercreditor Agreement. *See id.*; *see also id.* at 116a ¶ 14. The second order, which the bankruptcy court entered on September 24, 2001, approved a stipulation between Wolf and Wachovia authorizing Wolf to use a portion of the sale proceeds to pay administrative expenses of the bankruptcy proceedings and the remainder of the proceeds to pay the Bank Lenders in satisfaction of the DIP Financing and in partial satisfaction of the Bank Lenders' first-priority, pre-petition liens (the "Sale Proceeds Order"). *See id.* at 102a-

103a. Kodak was not a party to the stipulation and did not object to entry of the Sale Proceeds Order.

Thereafter, the official committee of unsecured creditors (the "Unsecured Creditors Committee") appointed in Wolf's bankruptcy case sued the Bank Lenders in the bankruptcy court, asserting that their liens had not been properly perfected and were, therefore, "avoidable" under bankruptcy law. *See* Pet. App. 6a. In July 2002, the bankruptcy court entered an order approving a settlement of that suit that modified the prior allocation of the sale proceeds and other assets of Wolf bankruptcy estate under the Sale Proceeds Order, so that the unsecured creditors would potentially be entitled to some recovery from the estate (the "Committee Settlement Order"). *See id.* at 86a-101a. The settlement provided that, if the Bank Lenders received $40 million from the estate on their secured claim, the Bank Lenders and Wolf's general unsecured creditors would share, on a *pro rata* basis, in any additional recoveries, because the Bank Lenders' collateral was insufficient to satisfy the Bank Lenders' claims in full and, hence, the Bank Lenders held an unsecured "deficiency" claim. *See id.* at 93a ¶ 3, 96a ¶¶ 9-10. No share of any such potential recoveries was allocated to Kodak because of the Subordination Agreement, which entitled the Bank Lenders to Kodak's share until the Bank Lenders' claims were paid in full. *See id.* at 96a ¶ 10. Kodak was not a party either to the Unsecured Creditors Committee's suit, or to the settlement resolving it. By this time, however, it had uncovered Wachovia's deception and had sued Wachovia in New York. Accordingly, Kodak sought and obtained clarification on the record of the proceedings that by approving the settlement of the Committee's suit, the bankruptcy court was not binding Kodak with respect to its separate Damages Action. *See id.* at 13a n.5, 168a.

Finally, on January 7, 2003, the bankruptcy court entered an order confirming Wolf's chapter 11 liquidating plan (the "Confirmation Order"). *See* Pet. App. 7a. While the plan gave effect to the Sale Proceeds Order and the Commit-

tee Settlement Order—it provided for the bulk of Wolf's bankruptcy estate to be distributed to the Bank Lenders and for Kodak to receive no distribution—the plan did not purport to release or enjoin the prosecution of Kodak's Damages Action against Wachovia. Accordingly, Kodak did not object to its approval or to the entry of the Confirmation Order, which did not address any of the facts alleged by Kodak in its Damages Action. *See id.* at 56a-73a; *see also id.* at 7a, 29a.

3. *Wachovia's Georgia Preclusion Action.* On October 11, 2002, Wachovia, joined by Wolf, sued Kodak in the bankruptcy court, seeking an injunction barring Kodak from prosecuting the Damages Action. Wachovia argued that the various Orders entered by the bankruptcy court (described above) barred the Damages Action on claim preclusion grounds. Wachovia's theory was that those Orders gave effect to the Subordination Agreement, which Kodak could have challenged in the bankruptcy proceedings but did not. *See* Pet. App. 49a. (Kodak does not challenge the Subordination Agreement in the Damages Action either.)

The bankruptcy court agreed, and entered a preliminary and subsequently a permanent injunction against Kodak's pursuit of its Damages Action. The bankruptcy court reasoned that the Damages Action was a collateral attack on its prior Orders approving the liquidation and distribution of Wolf's assets and that, accordingly, "the New York Action or any other action with the same nucleus of operative facts, is barred by the doctrine of *res judicata*." Pet. App. 55a.[1] Kodak appealed to the district court, which affirmed.

4. *Decision Below.* The court of appeals reversed, holding that *res judicata* did not bar the Damages Action for two independent reasons. *First*, the court of appeals ex-

---

[1] The bankruptcy court also remarkably held that the Damages Action was a "collateral attack" on the bankruptcy court's January 2003 Confirmation Order, even though Kodak filed the Damages Action five months *before* the bankruptcy court entered the Confirmation Order. *See* Pet. App. 47a, 51a, 53a, 54a.

plained that Kodak could not have obtained the full remedy it sought in the Damages Action—compensatory, consequential and punitive damages from Wachovia—by objecting to the entry of the Orders entered by the bankruptcy court in Wolf's bankruptcy. In response to such an objection, the bankruptcy court could have at most denied the motions pending before it—motions to authorize the DIP Financing, to approve the sale of Wolf's assets to Ritz Camera, to approve the agreed distribution of the sale proceeds and Wolf's other assets, and to confirm Wolf's liquidating chapter 11 plan giving effect to that agreement. Pet. App. 14a-15a. Moreover, even if the bankruptcy court could have applied the doctrine of "equitable subordination" (*see* 11 U.S.C. § 510(c)) to give Kodak priority over Wachovia in right of payment from the Wolf bankruptcy estate notwithstanding the Subordination Agreement, the estate and the loan balance owed by Wolf to Wachovia were not nearly large enough to satisfy in full Kodak's damages claims against Wachovia. Pet. App. 14a. The court of appeals accordingly applied the "most basic principle[]" that *res judicata* does not require a party to bring a claim in a forum in which it cannot recover the remedy it seeks. *Id.* at 15a.

Second, the court of appeals also held that Wolf's Georgia bankruptcy proceedings leading to the various Orders were not based on the same cause of action as Kodak's Damages Action. Pet. App. 19a. The court of appeals recognized that "*res judicata* applies not only to claims which were actually brought before the previous court, but also to those claims 'which could have been raised in that action'" as long as the two sets of claims arose out of the same cause of action. *Id.* at 17a (quoting *Kaiser Aerospace & Elecs. Corp.* v. *Teledyne Indus., Inc. (In re Piper Aircraft Corp.)*, 244 F.3d 1289, 1296 (11th Cir.), *cert. denied*, 534 U.S. 827 (2001)). The Eleventh Circuit applied the well-established "transactional" test, under which causes of action are the same if they share the same nucleus of operative fact. *Id.* But the court of appeals determined that in this case the facts underpinning Kodak's claims—that Wachovia had fraudulently (i) induced Kodak to extend credit to Wolf and (ii) seized the

loan proceeds—were not the same as those before the Bankruptcy court; indeed, the court of appeals noted that the facts of the Damages Action were legally irrelevant to the determinations that the bankruptcy court had to make when it considered whether to approve the DIP Financing, authorize the sale of Wolf's assets, approve the stipulated distribution of its assets, and confirm Wolf's plan containing no release of claims by one creditor against another. *Id.* at 19a-21a. For this reason, as well, the court of appeals held, *res judicata* did not apply. *Id.* at 22a.

REASONS FOR DENYING THE WRIT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. There is no disagreement among the courts of appeals on the fundamental questions presented in this case—whether *res judicata* bars claims not asserted in a prior proceeding in which the full remedy sought in the later suit was unavailable or where the two actions are not based on the same cause of action. The Eleventh Circuit correctly answered these questions in the negative, and no court of appeals has held to the contrary.

a. The Eleventh Circuit straightforwardly applied two uncontroversial rules of claim preclusion law. *First*, the court of appeals applied the "most basic principle[]" that *res judicata* will not bar a claim for failure to raise it in a separate forum if the full remedy later sought was not available in the earlier proceeding. Pet. App. 15a. This rule is black-letter law. *See* Restatement (Second) of Judgments § 26 (1)(c) (1982) (stating that a claim is not barred by *res judicata* in a second action where "[t]he plaintiff was unable . . . to seek a certain remedy or form of relief in the first action"). The Eleventh Circuit previously applied this same tenet in *Kaiser Aerospace & Elecs. Corp.* v. *Teledyne Indus., Inc. (In re Piper Aircraft Corp.)*, 244 F.3d 1289, 1296-1297 (11th Cir. 2001), and this Court denied certiorari. *See* 534 U.S. 827 (2001). The rule is consistent with prior deci-

sions of this Court as well those of the other courts of appeals.[2]

Second, the Eleventh Circuit applied the equally well-established rule that *res judicata* will not bar a claim based on a cause of action that is different from the one at issue in the prior suit. *See, e.g., Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591, 597 (1948) ("*[R]es judicata* applies to repetitious suits involving the same cause of action."). The court of appeals employed the common "transactional" test for evaluating this factor, under which two causes of action are the same if they "'arise[] out of the same nucleus of operative fact, or [are] based upon the same factual predicate.'" Pet. App. 17a (quoting *Piper*, 244 F.3d at 1297 (alterations in original)). *See also* Restatement (Second) of Judgments § 24 (adopting transactional test); *id.* cmt. a, Reporter's Note (stating that "[t]he Supreme Court has accepted the equation between claim and transaction in a variety of contexts in which the idea of claim is legally significant" and citing cases); *id.* cmt. b ("In general, the expression ['transaction'] connotes a natural grouping or common nucleus of operative facts."). The Eleventh Circuit applied the same transactional test in two prior bankruptcy cases, *Piper*, 244 F.3d at 1296-1297, and *Wallis* v. *Justice Oaks II*,

---

[2] *See, e.g., Marrese* v. *American Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 382 (1985) ("[C]laim preclusion generally does not apply where '[the] plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy.'" (quoting Restatement (Second) of Judgments § 26(1)(c) (alteration in original))); *Nestor* v. *Pratt & Whitney*, No. 05-1754-cv, 2006 U.S. App. LEXIS 24844, at *21 (2d Cir. Oct. 4, 2006) (same); *Pittsburg County Rural Water Dist. No. 7* v. *City of McAlester*, 358 F.3d 694, 709 (10th Cir. 2004) (same); *Froebel* v. *Meyer*, 217 F.3d 928, 934-935 (7th Cir. 2000) (same); *Corestates Bank, N.A.* v. *Huls Am., Inc.*, 176 F.3d 187, 198 (3d Cir. 1999) (same); *Aquatherm Indus., Inc.* v. *Florida Power & Light Co.*, 84 F.3d 1388, 1392 (11th Cir. 1996) (same); *Wolf* v. *Gruntal & Co.*, 45 F.3d 524, 527 n.4 (1st Cir. 1995) (same); *Feminist Women's Health Ctr.* v. *Codispoti*, 63 F.3d 863, 869 (9th Cir. 1995) (same); *Gargallo* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 918 F.2d 658, 663 (6th Cir. 1990) (same); *Texas Employers' Ins. Ass'n* v. *Jackson*, 862 F.2d 491, 502 (5th Cir. 1988) (same).

LTD (In re Justice Oaks II, LTD), 898 F.2d 1544, 1551-1152 (11th Cir. 1990), and this Court denied certiorari in both instances. *See* 534 U.S. 827 (2001); 498 U.S. 959 (1990). The Second Circuit has aptly described the transactional test as "time-worn." *Sure-Snap Corp.* v. *State St. Bank & Trust Co.*, 948 F.2d 869, 870 (2d Cir. 1991). To our knowledge, it is applied without controversy in every circuit.[3]

Wachovia effectively concedes that the legal principles the Eleventh Circuit applied are uncontroversial. It acknowledges that "[r]es judicata applies where the subsequent proceeding is based on the same cause of action," and notes that in making this determination "most courts have adopted the 'transactional test." Pet. 22 (internal quotation marks and citations omitted).[4] And rather than disputing the juridical doctrine that *res judicata* does not apply where the full remedy sought is unavailable, Wachovia instead argues, incorrectly, only that the full remedy was in fact available to Kodak in Wolf's bankruptcy. *See* Pet. 16. The petition identifies no question of law worthy of consideration by this Court.

b. The court of appeals' decision does not conflict with any case cited by Wachovia or known to us. Although Wa-

---

[3] *See, e.g., Countrywide Home Loans* v. *Davis (In re Davis)*, No. 05-6214, 2006 U.S. App. LEXIS 15840, at *13-14 (10th Cir. June 21, 2006); *Test Masters Educ. Servs.* v. *Singh*, 428 F.3d 559, 571 (5th Cir. 2005); *Mpoyo* v. *Litton Electro-Optical Sys.*, 430 F.3d 985, 987 (9th Cir. 2005); *Havercombe* v. *Department of Educ. of Commonwealth of P.R.*, 250 F.3d 1, 4-5 (1st Cir. 2001); *Pittston Co.* v. *United States*, 199 F.3d 694, 710 (4th Cir. 1999); *CoreStates*, 176 F.3d at 194; *Harris* v. *Ashley*, No. 97-5961, 1998 U.S. App. LEXIS 22698, at *10 (6th Cir. Sept. 14, 1998); *NBN Broad., Inc.* v. *Sheridan Broad. Networks, Inc.*, 105 F.3d 72, 78 (2d Cir. 1997); *Stanton* v. *District of Columbia Ct. of App.*, 127 F.3d 72, 78 (D.C. Cir. 1997); *Lane* v. *Peterson*, 899 F.2d 737, 743 (8th Cir. 1990); *In re Energy Coop., Inc.*, 814 F.2d 1226, 1231 (7th Cir. 1987).

[4] Wachovia could hardly advocate a different legal standard here, having argued to the bankruptcy court that its prior orders "preclude[d] the prosecution of the New York Action or any other action involving the same nucleus of operative facts." Pet. App. 49a.

chovia cites a number of decisions as evidence of a supposed "conflict," Wachovia misconstrues both the Eleventh Circuit's decision below and those of the other courts of appeals with which it claims the Eleventh Circuit has split.

In its first proffered circuit split (Pet. 21-26), Wachovia argues that the Eleventh Circuit's determination that Wolf's bankruptcy and Kodak's Damages Action did not arise out of the same cause of action conflicts with decisions of the Second, Third, Fifth, and Seventh Circuit. But as the petition itself observes, all of these other circuits have adopted the same "transactional test" that the Eleventh Circuit applied here, under which the "'critical issue is . . . whether . . . the two actions [are based] on the same nucleus of operative facts.'" *Id.* at 22 (alterations in original) (quoting *Bank of LaFayette* v. *Baudoin (In re Baudoin)*, 981 F.2d 736, 743 (5th Cir. 1993)). The Eleventh Circuit correctly applied the transactional test by comparing the operative facts relevant to (i) the various Orders entered in Wolf's bankruptcy proceedings and (ii) the claims asserted by Kodak in its Damages Action, and concluded that the two sets of proceedings did not share a common nucleus of operative fact. *See* Pet. App. 17a-21a.

That is also precisely what the courts of appeals did in the supposedly conflicting decisions Wachovia cites. In *Sure-Snap*, a company that had emerged from bankruptcy attempted to sue one of its pre-petition lenders in federal district court for tortious conduct that the debtor claimed had ultimately led to the debtor's bankruptcy. 948 F.2d at 871. The debtor had not asserted these claims against the creditor during the course of its own bankruptcy; indeed, it had failed timely to disclose to its creditor body that its bankruptcy estate included such potential claims when it submitted its schedules of assets in the bankruptcy, as it had been required to do under bankruptcy law. Moreover, its confirmed plan of reorganization not only failed to include any provision for it to bring such claims post-confirmation, but also provided for the allowance and payment of the lenders' claims against the debtor. *Id.* Under these unusual cir-

cumstances, the Second Circuit examined the "operative facts which were common to the[]" debtor's tort claim and its bankruptcy and concluded that "the entire basis of the contention[s] was the same" in both actions. *Id.* at 875 (internal quotation marks omitted).

The Third Circuit followed the same approach in another case on which the petition relies, *CoreStates Bank, N.A.* v. *Huls America, Inc.*, 176 F.3d 187 (3d Cir. 1999). That case involved a suit between two creditors, CoreStates and Huls, both of which had been lenders to the debtor, UCT, prior to its bankruptcy. *Id.* at 190. CoreStates and Huls had entered into a subordination agreement, under which UCT's debts to Huls were subordinated to its debts to CoreStates. *Id.* Nevertheless, and even though it could not pay CoreStates in full, UCT proposed a chapter 11 bankruptcy plan that called for it to pay Huls $600,000. *Id.* In response, CoreStates demanded that Huls pay this sum to it and objected to the plan. The bankruptcy court overruled the objection and confirmed the plan. CoreStates failed to appeal the confirmation order. Instead, it filed a separate action against Huls, alleging that Huls owed it the money under the subordination agreement. The Third Circuit held that this action was barred by *res judicata*, explaining that CoreState's objection to the bankruptcy plan had "involved the same underlying factual issues as [its] present claim," namely entitlement to the $600,000 under the subordination agreement. *Id.* at 192.

These cases, like the others Wachovia cites, stand for the unremarkable and uncontroversial principle that *res judicata* will bar (assuming all the other requirements for its application are met) a second action based on the same underlying facts that were at issue and resolved in the first proceeding.[5] They adopt no different approach from the

---

[5] *See Eastern Minerals & Chems. Co.* v. *Mahan*, 225 F.3d 330, 339 (3d Cir. 2000) (holding that *res judicata* applies where "the later claim arises from the same cause of action as a claim that was actually asserted or interposed in the earlier bankruptcy case and resolved in the confirma-

commonplace transactional analysis that the Eleventh Circuit applied here. On the contrary, they fully recognize that one creditor is *not* normally required to assert whatever claims it might have against another creditor in the bankruptcy of a common debtor and that *res judicata* will bar a subsequent action by one such creditor against another only if the would-be plaintiff creditor actually litigated the same nucleus of operative facts in the bankruptcy proceedings. In *CoreStates*, for example, the Third Circuit stressed that its conclusion would have been quite different had CoreStates, like Kodak here, not voluntarily chosen to litigate its entitlement to the $600,000 in bankruptcy court: "In the absence of extensive litigation of this claim in the confirmation proceeding, CoreStates would not now be prevented from bringing its suit." 176 F.3d at 206; *see also id.* at 199-200 ("CoreStates is of course correct that, in general, a creditor who does not raise a claim against another party to the bankruptcy proceeding cannot be precluded from later asserting a claim."). In so concluding, the Third Circuit analogized creditors in bankruptcy proceedings filed by a common debtor to joint defendants in a lawsuit brought by a common adversary, and cited to the black-letter rule of law that one defendant who elects not to assert a claim against another defendant as a cross-claim "'will not be barred by *res judicata* . . . from asserting it in a later action, as he would if the claim were a compulsory counterclaim.'" *Id.* at 199 (quoting

---

tion order"); *Baudoin*, 981 F.2d at 744 (holding that lender liability claims brought by former debtors in bankruptcy against their creditors three years after the bankruptcy proceedings were completed were barred by *res judicata* because the claims were "identical to those disposed of in the prior bankruptcies"); *Prochotsky* v. *Baker & McKenzie*, 966 F.2d 333, 335 (7th Cir. 1992) (holding that *res judicata* precluded the plaintiff's Title VII action because its factual underpinnings were the same as a prior ERISA suit brought by the same parties challenging the same discharge from employment); *Secon Servs. Sys., Inc.* v. *St. Joseph Bank & Trust Co.*, 855 F.2d 406, 409 (7th Cir. 1988) (applying *res judicata* to bar "an attempt to relitigate an issue that was decided in the bankruptcy court proceeding"); *Crop-Maker Soil Servs., Inc.* v. *Fairmount State Bank*, 881 F.2d 436, 440 (7th Cir. 1989) (same, citing *Secon*, 855 F.2d at 410).

6 Wright & Miller, *Federal Practice and Procedure* § 1431, at 236 (2d ed. 1990)).[6]

Wachovia's second proffered circuit split (Pet. 16, 26-29) is just as illusory as its first. Unable to cite any disagreement in the circuits on the actual principle of law the Eleventh Circuit applied in its separate ground for its holding below—that *res judicata* does not apply because Kodak could not have obtained in the Wolf bankruptcy proceedings the full relief it seeks in its Damages Action against Wachovia—Wachovia instead proffers a circuit split on a different issue that the Eleventh Circuit expressly declined to reach. The petition correctly observes that there is a division in the circuits on whether *res judicata* applies to claims over which the bankruptcy court would have had only "non-core," "related-to" jurisdiction.[7] Pet. 28-29 & n.9 (citing cases from the Second, Third, Fifth, Sixth, Seventh, Ninth and Tenth Circuits). But that split is irrelevant to this case. The Eleventh Circuit here explicitly stated it was "not necessary" to reach that issue because *res judicata* did not apply for entirely different reasons. Pet. App. 15a n.6. This case, therefore, presents no occasion for this Court to address that matter.

---

[6] *See also* Fed. R. Civ. P. 13(g); *Dunn* v. *Sears, Roebuck & Co.*, 645 F.2d 511, 512 n.1 (5th Cir. Unit A May 1981) ("cross claims are always permissive and a party who decides not to bring his claim under Fed. R. Civ. P. 13(g) will not be barred by *res judicata*, waiver, or estoppel from asserting it in a later action"); *United States* v. *Berman*, 884 F.2d 916, 923 n.9 (6th Cir. 1989) (same); *Peterson* v. *Watt*, 666 F.2d 361, 363 (9th Cir. 1982) (same); *Augustin* v. *Mughal*, 521 F.2d 1215, 1216 (8th Cir. 1975) (same).

[7] Under the Judicial Code, the district courts have jurisdiction both over "core" bankruptcy matters that "arise in" a bankruptcy proceeding or that "arise under" the Bankruptcy Code and, also, over "non-core" matters that merely "relate to" the bankruptcy proceeding. *See* 28 U.S.C. § 1334(b). The district courts may refer all such matters to the bankruptcy courts. *Id.* § 157(a). But with respect to non-core, related-to matters, a bankruptcy court may only issue proposed findings of fact and conclusions of law subject to *de novo* review in the district court (unless all parties consent to the entry of a final order by the bankruptcy court). *Id.* § 157(c); *see also Marshall* v. *Marshall*, 126 S. Ct. 1735, 1743 (2006).

Indeed, Wachovia acknowledges that the Eleventh Circuit "declared that it was not deciding this issue" (Pet. 29 n.9), but then incorrectly asserts that "its focus on whether Kodak could have obtained 'full relief' in the bankruptcy court was merely a surrogate for the same point" (*id.*). It was nothing of the kind. On the contrary, the Eleventh Circuit made clear that its conclusion did not turn on the statutory limitations on the powers of a bankruptcy court to dispose of "non-core" matters. *See* Pet. App. 15a n.6; *supra* n.7.

Instead, the court of appeals held that Kodak could not "have been made whole *in the bankruptcy case*" (Pet. 16 (emphasis in original)) for two entirely separate reasons: *First*, had Kodak objected to the entry of the various Orders, the bankruptcy court would have only been able, at most, to refuse to enter them; it "could not have . . . granted state law damages [to Kodak] in the context of the [motions filed by Wolf in its bankruptcy case]." Pet. App 14a. *Second*, even if the bankruptcy court could have "equitably subordinated" Wachovia's liens to Kodak's, "the amount Wachovia received from the bankruptcy would not [have] be[en] sufficient to meet Kodak's losses," *id.*, let alone to provide Kodak with the consequential and punitive damages it seeks in the Damages Action. Both of these points would have been equally true if the plan confirmation proceeding and other matters giving rise to the various Orders had been heard by a district court, which would not have suffered any of the limitations of a bankruptcy court that are at issue in Wachovia's proffered circuit split: It would still have been the case that Kodak could not have obtained full relief in the proceedings giving rise to the Orders both because such relief could have been obtained only in a separate lawsuit and because of the estate's limited funds and Wachovia's limited unpaid loan balance. Even Wachovia does not claim that either of these unremarkable conclusions—the former follows from black-letter law,[8] and the latter is entirely of a factual

[8] Under the applicable bankruptcy rules, Kodak would have had to sue Wachovia, commencing a separate "adversary proceeding" in the

nature—implicates any circuit split or raises any important issue of law warranting this Court's review.

Nor is Wachovia correct that the Eleventh Circuit's decision "ignores the 'related to' jurisdiction of the bankruptcy court" by supposedly failing to consider whether Kodak might have sued Wachovia in an adversary proceeding in Wolf's bankruptcy. Pet. 16. The Eleventh Circuit correctly observed, in *dicta*, that there is substantial doubt whether the bankruptcy court would in fact have had "related-to" jurisdiction "over a claim between two creditors when the outcome would not [have] affect[ed] the amount of money available in the bankruptcy estate." Pet. App. 16a.[9] But the

---

bankruptcy case, to seek an award of damages against it or equitable subordination of its claims and liens; it could not have sought such relief in Wolf's plan confirmation proceeding or the other hearings giving rise to the various Orders. *See* Fed. R. Bankr. P. 7001(1), (2), (8); Pet. App. 14a-15a. It is settled law that orders entered in response to mere motions filed in a debtor's general bankruptcy case, like the Orders here, cannot preclude, on *res judicata* grounds, claims that would have required the commencement of a separate adversary proceeding. *See, e.g.*, *Piper*, 244 F.3d at 1304; *Enewally* v. *Washington Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir.) ("confirmed plan has no preclusive effect on issues that must be brought by an adversary proceeding"), *cert. denied*, 543 U.S. 1021 (2004); *Cen-Pen Corp.* v. *Hanson*, 58 F.3d 89, 93 (4th Cir. 1995) (same); *D-1 Enters., Inc.* v. *Commercial State Bank*, 864 F.2d 36, 38-39 (5th Cir. 1989) (debtor's lender liability claims not barred by order in contested matter abandoning collateral to bank); *Novacare Holdings, Inc.* v. *Mariner Post-Acute Network, Inc. (In re Mariner Post-Acute Network, Inc.)*, 267 B.R. 46, 54-55 (Bankr. D. Del. 2001) (financing order no bar to title dispute, which must be determined in adversary proceeding); *In re Beard*, 112 B.R. 951, 956 (Bankr. N.D. Ind. 1990) ("If an issue must be raised through an adversary proceeding it is not part of the confirmation process and, unless it is actually litigated, confirmation will not have a preclusive effect.").

[9] It is well-established that a proceeding is not "related to" a bankruptcy case, for purposes of bankruptcy jurisdiction, if its resolution could have no conceivable effect on the debtor's bankruptcy estate. *See, e.g.*, *Celotex Corp.* v. *Edwards*, 514 U.S. 300, 308 n.6 (1995) ("[B]ankruptcy courts have no jurisdiction over proceedings that have no effect on [the estate of] the debtor."); *Feld* v. *Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 753 (5th Cir. 1995) ("[A] large majority of cases reject the notion that bankruptcy courts have 'related to' jurisdiction over third-party ac-

Eleventh Circuit then determined that it had no occasion to reach the question, explaining that

> the case turns not on whether Kodak could, but whether it was required to[,] bring an adversary proceeding in the bankruptcy to resolve its state law claim.
>
> Again, assuming the bankruptcy court would have had jurisdiction over the state claims in an adversary proceeding, it does not follow that the New York action would have been precluded. The sweeping limits of jurisdiction do not set the boundaries of res judicata.

Pet. App. 16a-17a.

This part of the decision below, as well, simply applies well-established law. *See, e.g.*, cases cited *supra* nn.3, 5-6 and accompanying text; *Eastern Minerals & Chems. Co.* v. *Mahan*, 225 F.3d 330, 337 n.12, 339 (3d Cir. 2000) (rejecting argument that "nondebtors must assert all potential claims in a bankruptcy case or be forever barred" and explaining that "[c]laim preclusion would have a broad scope indeed if it barred every claim over which a bankruptcy court might have had jurisdiction").[10] Again, Wachovia cites no case that

---

tions."); *Elscint, Inc.* v. *First Wis. Fin. Corp. (In re Xonics, Inc.)*, 813 F.2d 127, 131 (7th Cir. 1987) ("The bankruptcy jurisdiction is designed to provide a single forum for dealing with all claims to the bankrupt's assets. . . . That two creditors have an internecine conflict is of no moment, once all disputes about their stakes in the bankrupt's property have been resolved.").

[10] The contrary rule Wachovia apparently advocates would have potentially disastrous effects on the efficient administration of bankruptcy proceedings. It is *routine* for there to be separate civil litigation among creditors and other non-debtor parties based on claims that the parties might conceivably have been able to raise in the bankruptcy proceedings under the bankruptcy court's expansive "related-to" jurisdiction. *See supra* n.9. For example, in the *Enron* bankruptcy, the bankruptcy court confirmed a chapter 11 plan on July 15, 2004. *See In re Enron Corp*, No. 01-16034 (AJG Docket Entry 19759 (Bankr. S.D.N.Y. July 15, 2004) (Order Confirming Supplemental Modified Fifth Amended Joint Plan of Affiliated Debtors). Yet, as of that date, the *Enron* bankruptcy court

conflicts with the court of appeals' decision on this score, and we are aware of none.

2. The remainder of the petition concerns narrow issues of fact rather than law: Unable to identify any legal error or circuit conflict, Wachovia complains that the court of appeals erred in determining as a factual matter that Kodak could not obtain in Wolf's bankruptcy proceedings the full relief it seeks in the Damages Action and that Kodak's Damages Action and Wolf's bankruptcy did not share the same nucleus of fact.[11] Had the court of appeals erred in these determinations, a grant of certiorari would still be disfavored,[12] but in any event, there was no error.

---

noted that there were at least *ten* separate civil suits (including large consolidated actions) pending outside the bankruptcy court. *Id.* at 8. It would have made little sense to have required all of Enron's creditors to bring all such claims as adversary proceedings in Enron's bankruptcy; such a rule would certainly not have fostered either the economy of judicial resources that *res judicata* seeks to advance or the quick and efficient reorganization or liquidation of a debtor's estate that the Bankruptcy Code is designed to promote. *See, e.g., Allen* v. *McCurry*, 449 U.S. 90, 94 (1980) (purpose of *res judicata* doctrine is to foster judicial economy and legal certainty); *Sunnen*, 333 U.S. at 597 (same); *S.N.A. Nut Co.* v. *Häagen-Dazs Co. (In re S.N.A. Nut Co.)*, 215 B.R. 1004, 1011 (Bankr. N.D. Ill. 1997) (refusing, on *res judicata* grounds, to bar even a debtor from bringing claims after confirmation of its plan because a contrary rule "would contravene the central purposes of the Chapter 11 proceeding" and "restrict the ability of the debtor's principals to focus upon restructuring the debtor"); *Mariner Post-Acute Network*, 267 B.R. at 53 ("[T]he fact that a particular party may have an interest in a motion does not require that party to raise all interests or claims that it has in the bankruptcy case generally at the time that the motion is heard .... To apply *res judicata* so broadly would bring bankruptcy cases to a halt.").

[11] *See, e.g.*, Pet. 25 ("[T]he court of appeals here disregarded the commonality of facts and circumstances between the bankruptcy case and the N.Y. Action."); *id.* at 28 ("Had Kodak litigated its claims during the bankruptcy case and prevailed, . . . Kodak could have obtained whatever relief was appropriate ....").

[12] *Cf. Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 193 (1997) (declining to consider "fact-based rule-application issue" pursuant to writ of certiorari where there is "no reason to believe that there is any very obvious or exceptional error below").

The Eleventh Circuit correctly held that Kodak could not have recovered the full remedy it seeks against Wachovia through the various motions in Wolf's bankruptcy because, *inter alia*, "the amount Wachovia received from the bankruptcy would not [have] be[en] sufficient to meet Kodak's losses." Pet. App. 14a. In its Damages Action, Kodak seeks compensatory, consequential, and punitive damages that easily could exceed, by many multiples, the $30 million it was deceived by Wachovia into lending to Wolf. *See id.* at 199a. By contrast, the sum total available to all of the Bank Lenders (in respect of the pre-petition secured claims) in Wolf's bankruptcy amounted to only $21.7 million, of which Wachovia's share was only a small fraction. *Id.* at 14a. Wachovia's counsel properly conceded at oral argument before the court of appeals that the total amount Wachovia received from the bankruptcy would have been insufficient to satisfy Kodak's claims in the Damages Action. *Id.*

The court of appeals also correctly held that Wolf's bankruptcy was not based in the same cause of action as Kodak's Damages Action because the two sets of proceedings did not share a common nucleus of operative fact. Pet. App. 21a. Across four pages of text, the court of appeals meticulously scrutinized and compared the various facts and issues in the two actions. *Id.* at 18a-22a. As the court of appeals observed, "[t]he focus of the bankruptcy court, and rightly so, was the equitable distribution of the debtor's funds and the administration of the estate." *Id.* at 21a. In the Damages Action, by contrast, the focus will be on whether Wachovia deceived Kodak into making the $30 million loan to Wolf and should pay damages to Kodak as a result. As the court of appeals explained, the Damages Action accordingly concerns an entirely different set of facts: "It relies on evidence of Wachovia's alleged bad faith in failing to tell Kodak that it had encouraged Wolf to enter the loan so that it may pay its debts to Wachovia and the other pre-petition lenders." *Id.* at 18a. And while it is true that the Bankruptcy court *enforced* the Subordination and Intercreditor Agreements in the bankruptcy proceedings, that circumstance does not create a common nucleus of fact with the Damages

Action, in which "Kodak does not contest the validity or the enforcement of these agreements," but rather alleges that Wachovia *breached* them in the course of committing fraud. *Id.* at 21a. The court of appeals correctly determined that "[t]he evidence in support of this fraud claim . . . was not required to be considered in any of the hearings before the bankruptcy court and was not." *Id.* at 21a-22a.

* * * * *

In its Damages Action, Kodak has sued Wachovia for substantial fraudulent misconduct. Kodak was not obligated to assert these claims in Wolf's bankruptcy proceedings, and neither *res judicata* nor any other principle of law or equity should shield Wachovia and prevent Kodak from obtaining due consideration of the merits of its claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP D. ANKER
DAVID S. LESSER
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Ave.
New York, N.Y. 10022
(212) 230-8800

CRAIG GOLDBLATT
Counsel of Record
JOEL MILLAR
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20037
(202) 663-6000

NOVEMBER 2006